Supreme Court, U.S.
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No. 99-652

In The

Supreme Court of the United States

LAWRENCE C. AGEE
Petitioner,

vs.

JAMES MORSE
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1-11. Petitioner's first eleven Questions Presented concern allegations of Respondent's judicial acts made in the context of his role as presiding judge over Petitioner's divorce trial. These eleven questions can be reduced to one, as stated by Petitioner in his Argument, "The only issue on appeal is whether or not a claim of judicial immunity is valid under the circumstances of this case." (*Petitioner's Petition for Writ of Certiorari*, at 10). Thus, Respondent interprets Petitioner's Questions Presented 1-11 as encompassed by the following question: Whether a judge is entitled to judicial immunity for his judicial acts made within the scope of his jurisdiction as the presiding judge of Petitioner's divorce trial when he is sued by the divorce litigant for damages, declaratory judgment and injunctive relief setting aside the divorce judgment and ordering a new divorce trial.

12. Petitioner's twelfth Question Presented appears to be an allegation of the unconstitutionality of Vermont's state law allowing Supreme Court justices to sit as trial judges. Petitioner, however, failed to raise this allegation in his complaint and before the District Court and the Court of Appeals.

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STATEMENT OF THE CASE

Respondent is a Justice of the Vermont Supreme Court who continues occasionally to sit as a judge in the Vermont trial courts. Petitioner was a litigant in a divorce trial over which Respondent presided. Unhappy with the results of his divorce trial, Petitioner filed a suit in the United States District Court for the District of Vermont alleging that Respondent's conduct as trial court judge was improper and deprived him of his state and federal Constitutional rights and that Vermont's divorce law was unconstitutional. Respondent moved to dismiss Petitioner's suit on the grounds that Respondent was entitled to immunity for his judicial acts as a Vermont trial court judge. The District Court granted Respondent's motion to dismiss.

Petitioner appealed the dismissal to the Second Circuit Court of Appeals. Respondent moved to dismiss Petitioner's appeal on the grounds that it was frivolous and without merit. The Second Circuit granted Respondent's motion to dismiss, holding that the appeal was frivolous, citing *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991)(per curiam) as precedent for the application of the doctrine of judicial immunity to actions under 42 U.S.C. § 1983.

In a parallel action, Petitioner appealed his divorce decree to the Vermont Supreme Court, where the divorce

judgment was affirmed. *Dumont v. Agee*, No. 98:293, slip op., (Vt. April 21, 1999), 1999 Vt. Lexis 144 (S.Ct. 1999)(decision published without opinion).

Petitioner's factual allegations are based on Respondent's handling of Petitioner's divorce trial -- alleged rudeness to Petitioner and truncation of Petitioner's time to put on evidence at trial, alleged bias in the content of the judgment, alleged favoritism to Petitioner's ex-wife; weighing of credibility of the witnesses allegedly in favor of Petitioner's ex-wife; alleged mis-interpretation of the parties' pre-nuptial agreement; etc.* Respondent disputes these allegations, but the falsity of these allegations is irrelevant to the case. There is no dispute that all of Petitioner's allegations concern Respondent's judicial acts made within Respondent's general authority as the presiding judge over Petitioner's divorce trial. Thus, the sole issue in this case is whether Respondent is entitled to judicial

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* Petitioner has implied two new factual allegations in his Petition for Certiorari that were not raised below: the denial of his request to depose his wife before trial and some improper conduct of the Respondent's law clerk in the divorce trial. Because these allegations are not found in Petitioner's complaint and were not raised before the District Court or the Court of Appeals, they are waived before the United States Supreme Court. *See United States v. Alvarez-Sanchez*, 511 U.S. 350,360 n.5 (1994). Moreover, they too concern judicial acts by Respondent and would not affect his judicial immunity.

immunity in Petitioner's suit for damages, declaratory judgment and injunctive relief of setting aside the divorce judgment and ordering a new divorce trial.

To the extent that any of Petitioner's Questions Presented raise any other issues, Respondent objects to them on the grounds that they were not raised in Petitioner's Complaint, at the District Court or at the Court of Appeals. Consequently, Respondent notes that any such arguments will not be supported by the record. As noted above, Respondent believes that Petitioner's Questions 1-11 all concern Respondent's judicial acts and therefore pertain to the issue of judicial immunity. Petitioner's twelfth Question Presented appears to be an allegation of the unconstitutionality of Vermont's state law allowing Supreme Court justices to sit as trial judges. Because this argument was not raised at the District Court or the Court of Appeals, it is waived before the United States Supreme Court. *United States v. Alvarez-Sanchez*, 511 U.S. 350,360 n.5 (1994)(where respondent failed to raise 4th amendment argument in the District Court or Court of Appeals, Court found "no exceptional circumstances that would warrant reviewing a claim that was waived below" and adhered to its practice of declining to address arguments not raised below).

Also, Respondent points out that Petitioner misstates the

legal proceedings in his state court appeal of his divorce judgment when he implies that Respondent sat on the panel that heard his appeal to the Vermont Supreme Court and that the Vermont Supreme Court denied his request for an appeal. (Petitioner's Petition for Writ of Certiorari, at 7, ¶ 21). Justice Morse recused himself from Petitioner's case at the Vermont Supreme Court. The Court considered Petitioner's appeal on the merits and affirmed the divorce judgment. *Dumont v. Agee*, No. 98:293, slip op., (Vt. April 21, 1999), 1999 Vt. Lexis 144 (S.Ct. 1999)(decision published without opinion). These facts, however, are irrelevant to Petitioner's present case.

ARGUMENT FOR DENYING THE PETITION

A. Petitioner Fails to Meet the Standard for Granting Certiorari.

Pursuant to the Rules of the Supreme Court of the United States, "a petition for certiorari will be granted only for compelling reasons." Rule 10. Examples of such "compelling reasons" are: splits amongst the Circuit Courts, or between a state supreme court and a Circuit Court; blatant departure from judicial procedure; conflict with a United States Supreme Court decision; or an important matter of first impression for the United States Supreme Court. *Id.* Petitioner cannot

demonstrate any of these compelling reasons because there is no conflicting case law: judges are clearly entitled to judicial immunity for their judicial acts made within their jurisdiction.

B. The petition for certiorari should be denied because Vermont law grants Respondent absolute immunity from suit for his judicial acts on Petitioner's state law claims.

The Vermont common law doctrine of judicial immunity grants absolute immunity to judges for their judicial acts: "Immunity from liability in favor of the judges rests upon the broad ground of public policy, which declares that a judge, for acts done by him in his public capacity, is absolutely privileged from action." *LaPlaca v. Lowery*, 134 Vt. 56, 58, 349 A.2d 235 (1975)(*quoting Vaughn v. Congdon*, 56 Vt. 111, 128, 48 A.R. 758 (1883)(Powers, J. dissenting)(emphasis in original). Thus, pursuant to Vermont's absolute judicial immunity doctrine, the only issue is whether a claimant's allegations are based upon the "performance of an act which was judicial, and within [the judge's] general authority." *Id.* The policy behind this doctrine is to protect the judicial decision-making process "by making the judges free, independent and fearless in the discharge of their duties." *Id.*

Petitioner's allegations of misconduct are all based on Respondent's handling of Petitioner's divorce trial. Thus, these allegations refer to judicial acts, taken within Respondent's general authority as the presiding judge over Respondent's divorce trial. Moreover, Petitioner failed to assert in his complaint that the factual allegations of which he complained were non-judicial or outside the general authority of Respondent, and "such allegations were an essential part of his complaint if he was to avoid dismissal of his action." *Id.* at 59.

Since Petitioner's state claims relate only to Respondent's judicial acts taken within his general authority as presiding judge over Petitioner's divorce, Respondent is protected from the Vermont law claims by Vermont's doctrine of absolute judicial immunity.

C. The petition for certiorari should be denied because Petitioner's claims for damages under 42 U.S.C. §1983 are barred by the federal doctrine of judicial immunity.

The federal common law contains a doctrine of judicial immunity which grants judges absolute immunity from suits for damages for judicial acts. *Pierson v. Ray*, 386 U.S. 547, 554

(1967). The basis of this doctrine is that a judge should not be chilled from making controversial decisions. As the Court noted, a judge's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." *Id.*

The United States Supreme Court has explicitly held that Congress did not abrogate absolute judicial immunity from suits for damages when it enacted 42 U.S.C. §1983. *Pierson*, 386 U.S. at 554. Moreover, judicial immunity is not waived by allegedly malicious, corrupt or outrageous conduct. *Mireles v. Waco*, 502 U.S. 9, 11 (1991)("[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages. Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial."). Instead, judicial immunity is overcome only in two circumstances: where judges commit non-judicial acts or take actions with clear or complete absence of jurisdiction. *Id.* at 11-12.

As stated above, Petitioner's factual allegations concern Respondent's conduct as presiding judge at Petitioner's divorce trial. Petitioner has made no allegation of non-judicial conduct, nor has Petitioner alleged that Respondent's conduct at the

divorce trial or the resulting judgment were taken in complete absence of jurisdiction. Because Petitioner's factual allegations are based entirely on Respondent's judicial acts as presiding judge of his divorce trial, neither of the two exceptions to judicial immunity apply, and Respondent has absolute immunity from Appellant's suit for damages under 42 U.S.C. § 1983.

D. The petition for certiorari should be denied because Respondent's claims under 42 U.S.C. § 1983 for injunctive relief – setting aside a judgment and ordering a new trial -- are also barred by the doctrine of judicial immunity.

Petitioner also seeks certain injunctive relief: setting aside his divorce judgment and ordering of a new trial. These claims are also barred by judicial immunity. In *Pulliam v. Allen*, the United States Supreme Court established a narrow waiver of judicial immunity in cases involving claims under 42 U.S.C. §1983. 466 U.S. 522 (1984). The Court specifically held that such a waiver was limited to cases where the claimant sought to enjoin prospective unconstitutional behavior. Id. The *Pulliam* Court noted that the high standards for injunctive relief will provide formidable hurdles that will prevent frivolous

litigation against judges by dissatisfied litigants, specifically that these litigants will have to prove the inadequacy of any remedy at law and the serious risk of irreparable harm.

Petitioner's requests for injunctive do not seek to bar prospective unconstitutional behavior. Instead, he seeks only the reversal of the prior judgment, a new trial, and the sealing of the prior divorce file and attorney's fees. In other words, Petitioner seeks what he could have obtained through a successful appeal of his divorce judgment. For this reason, Petitioner is unable to mount the "formidable hurdles" described in *Pulliam*, the facts necessary to support a claim for injunctive relief. Petitioner cannot show that he has no adequate remedy at law or that he faces a serious risk of irreparable harm. Appellant had an adequate remedy at law: he appealed his divorce judgment. Petitioner is the dissatisfied litigant described in *Pulliam*, and his claims are barred by judicial immunity.

CONCLUSION

The petition for certiorari should be denied because Petitioner has failed to show any compelling reasons for granting it. There is no conflicting case law. Instead, all of the case law establishes that judges are immune from suit for their

judicial acts made within their jurisdiction, excepting the limited circumstances of the *Pulliam* case, where injunctive relief is necessary to bar prospective unconstitutional behavior. Petitioner cannot show these limited circumstances because the relief he seeks is merely a reversal of his divorce decree. Respondent is immune from such a suit and the petition should be denied.

Respectfully submitted,

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